

EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a
Washington corporation,

Plaintiff,

vs.

MOTOROLA, INC., and MOTOROLA
MOBILITY, INC.,

Defendants.

No. 2-10-cv-01823-JLR

VIDEOTAPED DEPOSITION OF TODD D. MENENBERG

June 20, 2013

Seattle, Washington

Job No. CS1685790

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1 including the highlighted version of those invoices?

2 A I believe that's correct.

3 I'm just looking to see if any of that came from the
4 Microsoft 360--

5 Q Okay.

6 A But I don't believe it did.

7 I believe those all came from Sidley invoices
8 themselves, as I recall.

9 Q And did your team-- did you and your team enter the data
10 into your Excel spreadsheet exactly as it appeared in the
11 highlighted invoices? In other words, were any changes
12 made?

13 A I don't believe we made any changes.

14 I do have a recollection we had some questions on
15 some entries that might have resulted in some
16 corrections, but then we put in the correct information,
17 but they were minimal, if any, but there were some
18 questions we had, but as I recall, whatever was given to
19 us was clarified, and we entered the correct number.

20 Q And do you recall-- well, do you recall with any more
21 specificity these instances where you had questions?

22 A I don't.

23 They were really minor.

24 They weren't significant.

25 Q When you had questions, did you ask those questions to

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1 Ms. Robbins?

2 A Yes.

3 Q And were the responses that you should use the numbers in
4 the highlighting-- as reflected in the highlighted
5 invoices or were the inputs changed from whatever was
6 reflected in the highlighted invoices?

7 A I think for the most part it was as given to us.

8 As I say, I think there were a couple small items.

9 I'm literally thinking of a couple out of a thousand
10 entries.

11 Q And were there any conversations with counsel regarding
12 any changes; for example, Ms. Robbins or another attorney
13 saying, "There is this error in the highlighting. For
14 this one, you should input this number"?

15 A You know, there may have been. I just don't remember
16 that.

17 Q And when you inputted the information from the invoices,
18 is it correct that you did not input the task
19 descriptions?

20 A That's correct.

21 Q Is there a reason why you didn't do that?

22 A Well, as you can imagine, this was a very time-consuming
23 project, one; two, we really didn't need that information
24 for purposes of what we were trying to do, so for both
25 practical and cost considerations, we didn't do it.

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1 Q On Page 10 there's a reference to Step 5 and that there's
2 a calculation that was performed in Step 5.

3 Is that correct?

4 A Yes.

5 Q It says that the hours in Steps 2C and 2D were
6 multiplied, but I don't see-- I'm not seeing what 2C and
7 2D are.

8 Can you clarify that?

9 A Well, it appears what happened in the draft of the
10 report, those step numbers didn't get updated, but what
11 that reflects at Step 5 is the hours, which go back to
12 Step 4, and then the respective rate, which was also
13 entered.

14 I just don't see exactly where it's itemized the
15 steps, but that's also in the database as well.

16 Q Okay. And the calculation performed in Step 5, was that
17 performed by the Excel program?

18 A Yes.

19 Q Step 8 also refers to a calculation.

20 Was that calculation also performed by Excel?

21 A Yes.

22 Q In calculating the amount of fees and costs that
23 Microsoft allegedly incurred from the Sidley Austin law
24 firm, what analysis of your own did you do of those costs
25 and fees?

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1 A Well, I think I talked about initially we set up a very
2 large database, and it literally is several hundred
3 pages, and each page has perhaps 40 or 50 entries, so
4 there was a substantial amount of data entry that was
5 required.

6 We also reviewed the invoices to help ensure the
7 accuracy we reviewed to see were there what appear to be
8 errors. In other words, did anybody charge more than 24
9 hours in a day.

10 We didn't find that, but we looked to see whether an
11 unusual number of hours were incurred.

12 We looked to see-- where there were an odd number of
13 hours billed, for example 1.3 hours, we did a second
14 inspection to make sure it wasn't entered as 13 hours, so
15 we did some additional clerical reviews of the work to
16 make sure that what was ultimately entered in the
17 database was accurate per the invoices.

18 We also did a read of the descriptions just to see
19 was there anything that struck us as extraordinary and,
20 from our perspective, might not be part of their work,
21 and nothing came to our attention.

22 There wasn't a substantial amount of work put in
23 that area, but the people reviewing the work did spend
24 some time doing an overview to see if anything struck
25 them as extraordinary or not potentially claimable.

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1 To be sure, it wasn't a detailed, you know, legal
2 review because we weren't intimately familiar with the
3 nature of what was being done, but we didn't want to see
4 things on there that were obviously for another client or
5 something that was just a blatant error, and we did take
6 a review to see if we detected any of those type of
7 mistakes.

8 I don't recall us finding those.

9 There were other general checks done on the work.

10 Those are the ones I remember as I sit here, but
11 there were a few others as well.

12 I think we looked to see also some of the timing.

13 We didn't want to see on a particular bill a line
14 item that was extraordinarily filed in the past.

15 In other words, you wouldn't want to see a 2010 bill
16 and someone charging time in 2008 or something of that
17 magnitude, so we also looked to see were the time entries
18 relatively in the ballpark where we would expect them to
19 be.

20 There were some things like that that were done on
21 our part, again with the goal of trying to get the most
22 complete and accurate number.

23 Q Now this additional analysis that you and your team
24 performed with regard to the Sidley invoices, where is
25 that described in your report?

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1 A I don't recall-- I don't think it is actually described
2 in the report. We just did that as part of our work to
3 help-- again, my goal was to try to get the most accurate
4 number based on the information that was given to me.

5 Q Did Microsoft or its counsel ask that you and your team
6 do that additional work?

7 A I don't recall specific discussions about that level of
8 detail, but that was just part of our work that we did.

9 Q So I would like to just go over each of the examples that
10 you just provided.

11 So the first one was you looked for unusual amounts
12 of hours, like over 24; is that right?

13 A Well, to be clear, when we met as a team, I instructed
14 the people, as they're doing the work, "Just be on the
15 lookout for something that is obviously potentially
16 incorrect," I should say-- not obviously, but is
17 potentially incorrect, and things of that magnitude were
18 about as detailed as we got.

19 Q Okay. But you didn't instruct your team and your team
20 wouldn't be in a position to make a decision as to
21 whether a particular legal task performed by an attorney
22 should have taken more or less hours than what was
23 allocated, right?

24 A That's correct, we did not do that level of detail.

25 Q So your team was just looking at something that would be

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1 obviously wrong, like one person billing 25 hours in a
2 day?

3 A Yes.

4 I have reviewed legal bills for other projects, and
5 I've also had positions where I've had to approve legal
6 bills in other projects, and these are the kinds of
7 things that we are asked to do, the nature of the tasks I
8 just described.

9 Q And then you said you also looked for odd numbers of
10 hours, and you described an example of a 1.3 time entry
11 being entered as 13.

12 Could you elaborate what you meant by that?

13 A Well, if we had someone that perhaps had an entry of 1.3
14 hours, we just might ask the individual Navigant person,
15 "Can you go back to the invoice and just double check
16 that, that that's not 13?"

17 It wasn't that the 1.3 in and of itself was a
18 problem. We just wanted to make sure if it was a little
19 of an odd entry, that we entered it correctly, so we did
20 a little more effort to make sure it was done correct,
21 besides the double coding that I talked about in the
22 report, the double entry.

23 Q So how did you decide what numbers needed to be
24 rechecked?

25 A This was more of an overview.

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1 It's not like we sorted the database and identified
2 every 1.3 and did them all.

3 This was just something I wanted them, in a general
4 sense, to be aware of, and if they chance to come upon
5 those things, to do a little more work just to help
6 ensure the overall accuracy.

7 Q And then I think you also stated that you and your team
8 read the task descriptions in the Sidley invoices to see
9 if the work was for these cases or not.

10 Can you better--

11 A We read the task descriptions in a general sense to see
12 if there was anything that jumped out at us that might
13 relate to a different client perhaps or, as I say, a
14 totally different time period that was unrelated to this
15 project, and then if we found those, to do further
16 inquiry, but I don't recall us finding those things.

17 Q Okay. Other than those checks that you and your team
18 performed, was there any other analysis that you did to
19 calculate any amount of fees and costs associated with
20 the Sidley invoices?

21 A Yeah. We were asked to delineate it in a few different
22 ways, and that's in the report, as you recall, by
23 subject, and then we also did it by whether it was 100
24 percent of the specific task or something less than 100
25 percent, so we delineated the results of our work in a

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1 few different ways.

2 Q I guess what I'm trying to get at is-- it appears from
3 your report that your team took the highlighted Sidley
4 invoices, input the information that was in those
5 invoices, and calculated totals based on what the
6 calculations in the Excel program-- I just want to make
7 sure there wasn't any additional analysis that you or
8 your team did with respect to changing data entries or
9 anything else or if it's purely entering the information
10 from the Sidley invoices into a database and coming up
11 with calculations from there.

12 A I think that's largely accurate what you said.

13 Q Okay.

14 A With the-- other than the points I've just talked about,
15 I think that's largely accurate.

16 Q Okay. Now, can you explain for me what you understand
17 the methodology was that was used to determine what work
18 was performed by Sidley as a result of Motorola's alleged
19 breach of contract?

20 THE WITNESS: I'm sorry, may I have
21 that question read back?

22 (Question on Page 57, Line 16-
23 19 read by the reporter.)

24 THE WITNESS: Well, based on my
25

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1 And in preparing Exhibit No. 1, did you rely on the
2 invoices from the various firms and the TyMetrix 360
3 system?

4 A Yes.

5 Q Anything else?

6 A Well, the allocations that were done by Sidley Austin.

7 Q Right.

8 So the highlighted invoices as well?

9 A Yes.

10 Q Okay. Turning to Exhibit No. 2, there's a 2A and a 2B, I
11 believe.

12 2A is for the Sidley Austin firm and 2B is for the
13 Calfo Harrigan firm?

14 A That's correct.

15 Q Can you explain to me how Exhibit No. 2 was created?

16 A Well, after creating an Excel database, I mean,
17 essentially what this has done is just to sort, using a
18 pivot table that creates this sorting based on hourly
19 rate-- minimal hourly rate at the top and expands to the
20 most expensive rate at the bottom.

21 Q Okay. And Exhibit No. 2 only covers the Sidley Austin
22 and Calfo Harrigan firms, correct?

23 A That's correct.

24 Q Do you know why that is?

25 A We were asked to do that by counsel.

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1 I don't know exactly why only those two firms, but
2 we were asked to do that.

3 Q Okay. And why did you sort the data entered into your
4 Excel spreadsheet by hourly rate?

5 A We were asked to do that.

6 Q Okay. Is there any-- do you have any particular purpose
7 for that, that you're aware of?

8 A No, I'm not aware of the reason that it would be used,
9 but we were asked to do that, and it was relatively easy
10 for us to do that.

11 Q Okay. And you don't intend to offer an opinion regarding
12 whether the hourly rates of various attorneys are
13 reasonable or not.

14 Is that correct?

15 A I don't believe I'll be asked to give an opinion on that.

16 Q Okay. Turning to the next exhibit, it's Exhibit No. 3.

17 Again, there's a 3A and a 3B for the Sidley Austin
18 and Calfo Harrigan firms.

19 Can you explain to me how Exhibit No. 3 was created?

20 A Again, this would have been off the same database using a
21 pivot table.

22 We, again, sort by hourly rates, but this time we
23 have the employees' names as well.

24 Q Again, this only covers the Sidley and Calfo Harrigan
25 firms as well, correct?

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1 A That's correct.

2 Q Is there a reason you didn't do the same for others?

3 A Only that we were asked to do it for these two firms.

4 Q And what is the purpose of having this exhibit that sorts
5 by time keeper?

6 A We were asked to do that.

7 Its ultimate purpose, I don't know, but we were
8 asked to do that, so we did it.

9 It was relatively easy for us to do that.

10 Q You don't intend to offer an opinion regarding whether
11 the number of time keepers who worked on these matters
12 was reasonable, do you?

13 A That's not within the scope of what I've been asked to
14 do.

15 Q And there's no opinion of that nature in your report,
16 correct?

17 A There is not.

18 Q Is it correct that in Exhibit No. 3A there are over 100
19 unique time keepers listed?

20 A I believe that's correct.

21 Q Turning next to Exhibit No. 4, can you tell me what this
22 exhibit is intended to show?

23 A This is another sorting of the information, just broken
24 up by client matter number.

25 Q And this is specific to Sidley Austin, correct?

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1 A That's correct.

2 Q Okay. And was it similarly created, sorting in the Excel
3 spreadsheet that you created?

4 A Yes, using a pivot table.

5 Q And when it refers to the client matter, there are only
6 three listed here, right?

7 A That's correct.

8 Q And is that because the Sidley invoices used-- ultimately
9 ended up using three different matters for-- that cover
10 work that they're claiming fees and costs for in this
11 case?

12 A I believe that's correct.

13 Q So when you refer to a client matter here, you're not
14 referring-- you're referring to a client matter as
15 referenced in invoices from Sidley to Microsoft, not
16 separate legal matters in various courts, correct?

17 A That's correct.

18 Q Turning next to Exhibit No. 5, can you explain to me what
19 this exhibit is intended to show?

20 A We were asked to also prepare a schedule that showed the
21 Sidley Austin fees and expenses by various subjects, so
22 these were the subjects that were given to us by
23 Ms. Robbins, and this is how the numbers came out.

24 Q Do you recall when you were asked to divide up the
25 information by various subjects?

EXHIBIT B

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF WASHINGTON

3
4 AT SEATTLE

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7
8 MICROSOFT CORPORATION, a)

9 Washington corporation,)

10)
11 Plaintiff,)

12) No. 2-10-cv-

13 vs.) 01823-JLR

14)
15 MOTOROLA, INC., and MOTOROLA)

16 MOBILITY, INC.,)

17)
18 Defendants.)

19
20
21 VIDEOTAPED 30(b)(6) DEPOSITION OF DAVID KILLOUGH

22
23 May 6, 2013

24
25 Job No. CS1661676 Seattle, Washington

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1 to H.264, and they -- you know, numbers of them just
2 typically were focused on those things.

3 And the same would be true for, you know, patents
4 that were declared essential to 801.11; there would
5 be some subset of folks that would spend, you know,
6 their time working on those, and might not do any
7 work on H.264 declared patents, for example.

8 That's the kind of, you know, specialization/
9 segregation of labor that I was thinking of.

10 Q Okay. And was that segregation of labor solely at
11 Sidley, or was that also at Harrigan and Michael
12 Best's firm?

13 A I typically think of it as it would be, you know,
14 Sidley with that kind of segregation.

15 Q Do you know the names of the attorneys who were
16 focused on the 802.11 standard-essential patents?

17 A No, I don't have a clear recollection as I sit here.

18 Q Do you know the names of the attorneys who were
19 focused on the H.264 standard-essential patents?

20 A Yeah. Certainly Doug Lewis was -- was one of them.

21 And I just don't have a clear recollection of
22 whether John McBride was principally H.264 or 801.11,
23 but there were, you know, several folks. I'm just --
24 just can't sort out in my mind who exactly was the --
25 you know, focusing on which bucket versus another

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1 bucket of patents.

2 Q And to your knowledge, was there any -- any groups of
3 subsets of attorneys at Sidley focused on the '680
4 patent or the '582 patent asserted by Microsoft?

5 A Certainly there would have been attorneys that would
6 do just spadework and the due diligence necessary to
7 assert, you know, a patent. And I can't remember who
8 that may be. And they may have and expect would be
9 involved in other things, you know, as well and not
10 dedicated just to that.

11 It would seem to me to be unlikely that we had
12 anybody dedicated to the 699 counterclaims, the
13 patent aspects of those.

14 Q Okay. And to your knowledge, when you were speaking
15 about the people who were focused on the 802.11 and
16 H.264 patents, did those attorneys also work on other
17 aspects of the cases, or did they solely work on --
18 on those patents?

19 A I don't have a specific recollection. They may well
20 have worked on other patents as well and other
21 aspects of the case. I think that would be, in many
22 instances, likely that they didn't just do H.264 or
23 just 802.11 patents.

24 Q Are you aware of any documentation that breaks down
25 the different sets of attorneys at Sidley that had

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1 allocation for that particular entry and it's
2 indicated in yellow.

3 Q And so for that particular entry, I think -- are you
4 looking at one of the ones on November 22nd, 2010?

5 A Right.

6 Q So we'll take the very first one for JL Secord.

7 Am I understanding you correctly that Microsoft
8 is going to be seeking to recover 80 percent of
9 the .5 hours that Mr. or Ms. Secord billed on that
10 particular task?

11 A Correct.

12 Q So if you could tell me how -- how the various
13 different percentages reflected in the color
14 coding -- how Microsoft got to each one.

15 A Yeah. There -- there are certainly some broad
16 categories. I think the broadest one is probably,
17 you know, the yellow one that -- that reflects the --
18 something that was done that was spread across all
19 five patents and, therefore, is allocated for, you
20 know, 80 percent, because there's four out of five
21 are standard-essential patents.

22 And so you'll probably see a lot of yellow in
23 here. I haven't studied it to see that, but that's
24 my best guess.

25 And then at a point in time where one of

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1 allow you to make that finer allocation, did
2 Microsoft basically apply a general percentage rule
3 based on the patents in play at that time in the
4 case?

5 A One of two things would happen. It would either be
6 thrown out and not requested recovery at all. If --
7 if there wasn't enough information from the entry to
8 determine, then it would just be thrown out.

9 If the entry reflected, you know -- it was
10 clearly, for example, on the ITC 752 case, if it was
11 clearly an activity that, you know, could have
12 applied across the board to all patents, then, yes,
13 you apply the general rule.

14 Q Now, who -- who actually went through and did all the
15 allocations?

16 A For Sidley, I believe Ellen Robbins did.

17 Q Poor Ellen, all by herself?

18 A That's my understanding.

19 MS. ROBERTS: Sounds like fun.

20 MS. ROBBINS: True.

21 Q (By Ms. Roberts) Okay. And --

22 MS. ROBBINS: Let's repeat that
23 "poor Ellen" part again a little louder, to make
24 sure...

25 Q (By Ms. Roberts) So Ellen did the allocations.

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1 Q Okay.

2 A -- is, they didn't do the highlighting. They would
3 take the highlighting into account in crunching the
4 numbers.

5 Q Okay. If you look at -- let's see here.

6 If I could turn your attention to Exhibit 11.

7 A Mm-hm.

8 Q There's a lot of material redacted in this exhibit.
9 There's also some material that is blacked out.

10 So when I say "redacted," I'm referring to
11 entries that say "Redacted." And then an example of
12 something blacked out is on the page ending in 740A.

13 Is there a difference in meaning between redacted
14 and blacked out?

15 A I can make an assumption based on the allocation key,
16 but it's only an assumption. I don't know that
17 there's any difference.

18 The -- you know, the -- the highlighting key on
19 the first page appears to have a black for a zero
20 percent allocation. And so that might be distinct
21 from redacted, even though both result in a zero
22 percent charge.

23 Q So is -- for information that is redacted, using the
24 term "Redacted," is Microsoft seeking any fees or
25 costs in association with that redacted material?

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1 to reflect 75 percent?

2 A That's the only thing close.

3 Q Okay.

4 A I'd read it that way.

5 Q It's not the 33 percent that's the lighter purple?

6 A Looks like the 75 percent to me, comparing it.

7 Q And do you know how -- how Microsoft determined to
8 allocate these entries at 75 percent?

9 A I expect it's based on the ratio of number of
10 standard-essential patents versus number of not
11 standard-essential patents that were in play at this
12 particular point in time in the ITC.

13 Q So the determination to allocate these entries at 75
14 percent, was it based on any of the specific
15 narrative entries or application of the ratio of the
16 number of patents in play at the time?

17 A From the entries, I would expect it would be that --
18 the general rule versus some more specific knowledge
19 of these particular activities.

20 Q Okay. If you turn to the next -- flip the page to
21 552A.

22 A Okay.

23 Q There are some entries there that are not
24 highlighted.

25 A Right.

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1 EXAMINATION (Continuing)

2 BY MS. ROBERTS:

3 Q Mr. Killough, you've been handed what was marked
4 as Exhibit 14, which has the Bates No.
5 MS-MOTO_1823_0006000695A.

6 If I could turn your attention to Page 723A.

7 A Okay.

8 Q At the top of the page there, there are four entries
9 for December 3rd, 2012, three of which are
10 highlighted in blue, and the other, the fourth, is
11 not highlighted.

12 Do you see where I'm referring to?

13 A December 4?

14 Q December 3rd.

15 Well, I guess it says -- yeah, sorry.

16 A 12/4 --

17 Q In the date column, it's 12/4/2012.

18 A Ah, okay.

19 Q In the description column, it's listed as 12/3/12
20 through 12/7/12.

21 A Right.

22 Q Do you see what I'm referring to there?

23 A Right.

24 Q So I'm wondering if you know why three of these
25 entries for the same date range and identified as

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1 "Preparation for ITC hearing in DC" were given 50
2 percent allocation and one was given a hundred
3 percent allocation.

4 A I don't know. Based on the information provided
5 here, I can't tell.

6 Q I'm going to hand you what we will mark as Exhibit
7 15, which has the Bates No. MS-MOTO_1823_0006001082A.
8 (Exhibit No. 15 marked
9 for identification.)

10

11 Q (By Ms. Roberts) And if I can turn your attention to
12 Page 1144A.

13 A Okay.

14 Q And certain of the entries on this page are not
15 highlighted, which indicates, as I understand it,
16 that Microsoft is seeking to recover a hundred
17 percent of those fees; whereas, others are
18 highlighted in yellow, indicating 80 percent.

19 How was it determined which should receive the
20 80 percent indication versus the hundred percent
21 indication?

22 A It's by the -- the persons' activities.

23 Q So, for example, on January 8th, 2012, JW McBride
24 drafted cross-examination outlines --

25 A Right.